UNITED STATES SUPREME COURT

Badham v. Eu,

___U.S.___, No. 87-1818 (Jan. 17, 1989).

Supreme Court Upholds California Redistricting Plan

In a one-sentence decision, the U.S. Supreme Court upheld a three-judge panel's decision that California legislative and congressional districts do not violate the equal protection clause of the United States Constitution.

In a six-to-three vote, the justices simply affirmed the lower court decision issued in April 1988 (see CRLR Vol. 8, No. 3 (Summer 1988) pp. 133-34), which held that California Republicans had not been deprived of political power and representation. The lower court noted, in part, that in light of the Republicans' presence in 18 of 45 House seats, one of two Senate seats, and the governorship, California Republicans were not wholly disenfranchised.

The Supreme Court decision was somewhat surprising, given the procedural posture. The Court had dismissed the appeal on October 3; but on November 14 had announced it might hear full argument. No explanation was given for the ruling or the decision not to proceed with full briefing and argument.

Allegheny Pittsburgh Coal Co. v. County Comm'n,

___U.S.___, 89 D.A.R. 691, No. 87-1303 (Jan. 18, 1989).

Property Tax Differentials Based on Time of Purchase Unconstitutional

In a case expected to have potential repercussions in California, the U.S. Supreme Court held that property tax assessments that base their valuation on time of purchase of the property violate the equal protection clause of the United States Constitution.

The case arose in West Virginia, where a county tax assessor established her own policy of setting the property value assessment based on the price at the time of purchase of the parcel, and made only modest reevaluations thereafter. Because of inflating land values, the result was gross disparities in tax payments, as the more recently purchased properties were appraised at far higher rates than those which still carried old valuations. This practice is colloquially known as the "welcome stranger" method, since existing property owners can effectively put higher tax payments on newcomers. The plaintiff coal company annually paid the tax, annually challenged the assessment, and annually lost at the administrative level. A suit brought in state court was successful on constitutional grounds, but was reversed by the West Virginia Supreme Court, which held that no taxpayer could be heard to complain that the method of assessing his/her taxes based on purchase price was unfair; the only remedy, the court held, was to seek to raise the assessed value of the neighboring parcels.

The Supreme Court, per Chief Justice Rehnquist writing for a unanimous court, held that the resulting differences in assessed value—amounting to 8 to 35 times higher tax rates—violate the equal protection clause. The Court also held that it is inappropriate to remit the complainant to attempt to raise others' tax rates. Rather, the case was remanded for reduction of the taxpayer's payment to that equal to equivalent parcels.

Because Proposition 13, which added Article XIIIA to the California Constitution, contains a very similar assessment scheme, the impact on California is potentially enormous. Under Proposition 13, all property in 1978 was rolled back to its assessed rate in 1975, with 2% increases permitted annually. However, all property is reassessed at full market value upon sale. Under the current market for residential property in California, differentials in assessed rates of ten times are common. However, the Supreme Court in a footnote specifically noted that it was not deciding the validity of a statewide scheme such as Proposition 13, but only a county system without state sanction. The validity of Proposition 13 is nearly certain to be tested within the year.

CIRCUIT COURTS OF APPEALS

Montero v. Meyer,

___F.2d___, No. 88-2469 (10th Cir., Nov. 1, 1988);

Delgado v. Smith,

___F.2d___, No. 88-6068 (11th Cir., Nov. 4, 1988).

Voting Rights Act Does Not Require Initiative Petitions To Be Bilingual

In a pair of cases, federal appellate courts recently held that the language provisions of the Voting Rights Act, 42 U.S.C. section 1973b(f), do not apply to petitions being circulated for initiatives. Such petitions are not, in the courts' views, part of the "voting" or "electoral" process, as are ballots and other materials distributed at election time. The cases were particularly noteworthy, because both courts disagreed with U.S. Department of Justice guidelines interpreting the Act, and because in both cases the circulated petitions were to place on the ballot initiative measures to declare English the "official language" of the states of Colorado and Florida.

CALIFORNIA SUPREME COURT

Center for Public Interest Law, et al. v. Fair Political Practices Commission, et al.,

No. S007758 (Dec. 15, 1988).

Challenge to FPPC's Proposition 73 Ruling Ordered Reinstated

The California Supreme Court recently granted the Center for Public Interest Law's (CPIL) petition for review of the Fourth District Court of Appeal's denial of its petition for writ of mandate challenging the Fair Political Practices Commission's (FPPC) interpretation of Propositions 68 and 73, two campaign finance reform initiatives approved by the voters in June 1988.

The case involves CPIL's challenge to the FPPC's ruling that virtually none of Proposition 68 survives the simultaneous passage of Proposition 73. When two initiatives on the same subject matter pass simultaneously, both must be implemented. In areas where there is "irreconcilable conflict" between the provisions of the two initiatives, the one which received the most votes—here, Proposition 73—prevails.

Among other things, Proposition 73 prohibits the use of "public monies" to fund political campaigns. Proposition 68 creates a "Campaign Reform Fund" which is fed by voluntary taxpayer-designated contributions on state income tax forms. CPIL contends that Proposition 68's Campaign Reform Fund is not the use of "public monies" as defined and prohibited by Proposition 73; further, the voluntary $3 contribution is a tax credit, which is not considered "public monies." The FPPC ruled that Proposition 73's use of "public monies" for campaigns "irreconcilably conflicts" with the Campaign Reform Fund provisions in Proposition 68. The Center challenged that ruling before the Fourth District, which agreed with the FPPC's interpretation and dismissed CPIL's case.

The December 15 Supreme Court ruling, however, ordered the Fourth District to reopen the case and issue an alternative writ, thus requiring the FPPC to show cause why the Center's petition should not be granted. Briefing concluded on January 31; oral argument will take place during the spring.

Henning v. Industrial Welfare Commission,

__Cal. 3d__, 88 C.D.O.S. 7600, No. C004101 (Oct. 31, 1988).

Two-Tiered Minimum Wage For Tipped Employees Unlawful

The California Supreme Court held that a two-tiered minimum wage under which employees who customarily receive tips are afforded a lower minimum wage violates California law.

Effective July 1, 1988, the California Industrial Welfare Commission's Order No. MW-88 raised the minimum wage in California from $3.35 to $4.25 per hour, but also established an alternative minimum wage of $3.50 per hour for those who customarily receive tips in excess of $60 per month.

Petitioners, the AFL-CIO and its officials and members, filed for a writ of mandate in the court of appeal. Two hotel and motel and restaurant associations intervened in defense. The court of appeal granted the writ, holding that Labor Code section 351, on its terms, as previously interpreted by the Commission, and in decisional law of the state Supreme Court, bars any but a uniform minimum wage.

The Supreme Court, acting on an expedited hearing schedule, affirmed, per Justice Mosk, joined by Chief Justice Lucas and Justices Panelli, Eagleson, and Kaufman. The Court set out at length the history of tips in California law under which, essentially, tips have moved from being absolutely barred, to being a credit against the employer's obligation to pay wages, to being an item for which the Commission could permit an offset against minimum wage payments, to being the exclusive property of the employee, with no authority for the employer or Commission to control or offset against wages. The Court took particular pains to note that the Commission had in an earlier case before the Court taken the explicit position that section 351 prohibits taking tips into account in setting or paying minimum wages, and the Court had adopted that position. *Industrial Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690 (1980). In light of this history, the Court was unwilling to accord the usual deference to administrative interpretation of its jurisdictional statute.

Justice Broussard, joined by Justice Arguelles, concurred specially to score the Commission for abandoning its earlier position. In light of the judicial imprimatur definitively interpreting the statute, it was no longer a matter for debate and it was inappropriate for the Commission to presume it could simply change its mind. Justice Broussard wrote to underscore that the deference owed administrative agencies in interpreting statutes should not be overstated and is not binding.

Committee To Defend Reproductive Rights v. Kizer,

No. S007691 (Dec. 15, 1988).

Supreme Court Declines Medi-Cal Abortion Case

For the second time since the change in the Supreme Court following the 1986 election that resulted in three Deukmejian appointees replacing three Brown appointees, the Court has refused to revisit the issue of whether the state must provide Medi-Cal funding for abortions for the poor.

In what has become an annual ritual, the legislature passed an explicitly unconstitutional limitation in the Budget Act, prohibiting payment of any Medi-Cal funds for abortions for the indigent. This practice was struck down in *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252 (1981), where the Court held that so long as abortion is a legitimate procedure and constitutional right, and the state provides medical care payments for other procedures, it may not invade a woman's state constitutional right to privacy to determine for her what medical decision she may make. Since then the legislature annually includes the limitation, the Committee annually files suit and wins, and the limitation is eliminated.

This year's case was slightly different, in that the Attorney General refused to defend the state, calling it a waste of effort and state funds. Department of Health Services attorneys took up the cudgel and lost. As with last year, only Chief Justice Lucas and Justice Panelli voted to hear the matter. Under Supreme Court rules, four votes are needed to grant review.

Foley v. Interactive Data Corporation,

__Cal. 3d__, 88 D.A.R. 16079 (Dec. 29, 1988).

Wrongful Termination Case May Not Include Tort Damages

In a long-awaited decision, the California Supreme Court upheld a cause of action by fired employees for wrongful termination, but strictly limited the available damages to contract damages, and excluded all tort remedies, including punitive damages.

The Court reviewed what was otherwise a garden-variety wrongful termination suit, which alleged the three basic causes of action for wrongful termination: (1) a tort cause of action for termination in violation of public policy; (2) a contract action for breach of an implied covenant to fire only for cause; and (3) a tortious act of firing in violation of the general obligation of good faith and fair dealing which is read into all contracts. The trial court sustained a demurrer without leave to amend, which was upheld by the court of appeal.

On review the Supreme Court, per Chief Justice Lucas joined by Justices Panelli, Arguelles, and Eagleson, affirmed and reversed. On the public policy theory, the Court held that the public policy—whether embodied in Constitution, statute, or other policy—must be one that affects the public at large. Since the plaintiff's alleged "policy" was one affecting only the employer, no cause of action was stated.

On the contract issue, the Court reversed, holding that the statute of frauds—which prohibits the enforcement of an oral contract whose term extends beyond one year—does not apply to open-ended employment contracts. The Court noted that the lower court decision was in conformity with an earlier decision of the same court, but which was in irreconcilable conflict with an earlier Supreme Court decision. The Court also held that the contract alleged could be oral, and its implied term of firing only for cause could similarly be oral, both of which could overcome the presumption in Labor Code section 2922 that contracts for employment without a definitive term are terminable at will.

The Court then turned to the most momentous issue in the case—the nature of the remedies available for breach of the implied covenant of good faith and fair dealing in employment contracts. Following a lengthy canvassing of past and present authority, the Court held that only contract damages for lost wages are available; and that no tort damages, including general damages for pain and suffering and punitive damages, are available.

Justices Broussard, Kaufman, and Mosk each filed separate opinions dissenting from the third holding.

The case has been closely watched by attorneys and employers throughout the state, as it was originally accepted for review by the Bird Court, but then became a Lucas Court matter when it was not decided prior to the Brown appointees' departure on January 1, 1987. The plaintiffs' bar universally criticized the decision as rendering most wrongful termination cases unattractive for filing, because of the severe limitation on available damages.

State of California v. Texaco,

___Cal. 3d.___,
209 C.D.O.S. 7431 (Oct. 20, 1988).

California Antitrust Law Cannot Bar Texaco-Getty Merger

The California Supreme Court held that state antitrust law, as embodied in the Cartwright Act, Business and Professions Code section 16720, does not apply to the merger of Texaco and the California operations of the Getty Oil Company.

The Attorney General of California brought suit to enjoin the widely publicized merger of Texaco and Getty, as it affects Texaco's takeover of Getty's California operations. The merger created the second-largest oil company in the United States. Pursuant to federal antitrust law, it was reviewed by the Federal Trade Commission (FTC). The FTC issued a complaint under Title 7 of the Clayton Act, 15 U.S.C. section 18, based in part on complaints from the California Attorney General. The FTC eventually entered into a consent order with Texaco, permitting the merger subject to some limitations and conditions, a few of which affects California. The California Attorney General was dissatisfied, and filed suit in state court based largely on the Clayton Act complaint, alleging anticompetitive effects in California.

The Court, per Chief Justice Lucas, joined by Justices Panelli, Arguelles, and Eagleson, held that neither the Cartwright Act nor the Unfair Business Practices Act, Business and Professions Code section 17200, are intended to or do apply to the mere fact of a merger, but only to ongoing conduct.

Justice Mosk, in a lengthy dissent joined by Justices Kaufman and Broussard, would have held that a cause of action could be stated under the Cartwright Act against the merger as it affected California.

CALIFORNIA COURTS OF APPEAL

Murat v. Centennial Ins. Co.,

___Cal. App. 3d___, 88 D.A.R. 16073,
No. B033361 (2d Dist., Dec. 23, 1988).

Insurer Can Override Choice of Counsel Used By Insured

The Second District Court of Appeal has upheld a new statute permitting an insurance company which is required to provide independent counsel to oversee the choice of counsel and require an attorney with minimum experience and malpractice insurance.

As part of a package of tort reforms passed in 1987, section 2860 was added to the Civil Code. The statute at issue permits an insurer to place limits on the counsel its insured may retain when independent counsel is required under *San Diego Federal Credit Union v. Cumis Insurance Society, Inc.*, 162 Cal. App. 3d 358 (1984). Attorneys retained to represent the insured to avoid any conflict between the insured and insurance company are known as "*Cumis* counsel" and are paid by the insurance company. The new statute permits a company to require that *Cumis* counsel have at least five years' experience both in tort and in the particular area being litigated, and have errors and omissions insurance.

Following a dispute between the insured and the homeowners' insurance company over which attorneys the insured wanted to represent her in a "toxic tort" case, declaratory relief actions were cross-filed in June 1987. The new statute was passed on the last day of the legislative session in September 1987, and took effect on January 1, 1988. The trial court granted the company's requested relief.

The Court of Appeal, per Justices Croskey, Klein, and Danielson, affirmed. The court dismissed arguments grounded in due process and equal protection, and held that the statute is procedural in nature and hence may be applied to pending as well as future cases.